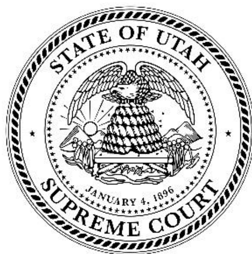


Utah Supreme Court
Rules of Criminal Procedure Committee

Meeting Agenda

Doug Thomspon, Chair

Location: WebEx Meeting: https://utcourts.webex.com/meet/brysonk

Date: May 21st, 2024

Time: 12:00 p.m. – 2:00 p.m. MST

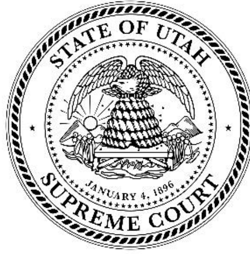
Action: Welcome and approve January 16th and March 19th Minutes	Tab 1	Doug Thompson
Discussion: Updated Proposal to Rule 17(k)	Tab 2	Doug Thompson/Lori Seppi
Discussion: HB209 and request to amend Rule 12.5	Tab 3	Bryson King
Discussion: Review of Public Comments to Rule 8	Tab 4	Doug Thompson

https://www.utcourts.gov/rules/urcrp.php

Meeting Schedule for 2024:

July 16th
September 17th
November 19th

Tab 1



Utah Supreme Court
Rules of Criminal Procedure Committee

Meeting Minutes
January 16, 2024

Committee members	Present	Excused	Guests/Staff Present
Douglas Thompson, Chair	X		Bryson King, Staff
Judge Kelly Schaeffer-Bullock	X		Amber Stargell, Rec. Secretary
Matthew Tokson		X	
William Carlson		X	
David Ferguson	X		
Meredith Mannebach	X		
[Vacant]		X	
Judge Denise Porter		X	
Janet Reese	X		
Lori Sepi		X	
Karin Fojtik	X		
Judge Kristine Johnson		X	
Adam Crayk	X		

Agenda Item #1: Introduction and Approval of Minutes

Doug welcomed the Committee members to the meeting and reviewed the last meeting's minutes. Doug and Bryson addressed a request to change the minutes to show that Karin Fojtik, not Lori Seppi, moved to approve Rule 8 from the last meeting. After that change was made, David Ferguson moved to approve the meeting minutes. Adam Crayk seconded the motion. Without a quorum present, the motion will be temporarily suspended until the remaining members needed can approve the motion via email.

Agenda Item #2: Amendments to Rule 17.5

David Ferguson then presented amendments to 17.5. David stated that the new provisions would give judges more discretion in regard to virtual appearances. The group discussed whether the rule should include a waiver of appearance language or should the waiver be sent by the courts to parties. Doug added the Supreme Court asked the committee to come up with a list of constitutional "right-to-appear" in-person hearings. Doug suggested that all hearings are constitutionally required to be held in-person. David researched and provided the group with the statutory definition of "important criminal justice" hearings. Karin suggested that the group considers victim required notifications of certain hearings as a way to help create a list for the court. Doug suggested that the group finalizes changes within the next week or two and to continue the discussion via email due to urgency from the court.

Agenda Item #3: Update on the Probation Consolidation Committee

Meredith presented updates from the probation consolidation committee. Judge Porter, Judge Hruby-Mills, Lex Garcia, and Lex Garcia's deputy met to discuss the probation rule. The probation consolidation rule and suggested changes to the rule will be presented to the Board of District Court Judges on Friday January 19, 2024, at noon.

Agenda Item #4: Bench Warrant Rule 9

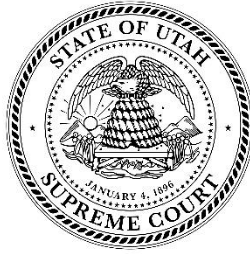
Doug presented new proposals from Judge Shaughnessy and Judge Farr regarding Rule 9. Doug began drafting a new rule and is seeking suggestions on the new proposal. The proposal suggests a court shall set a hearing within 14 days of arrest after a bench warrant is issued. The Committee discussed the time frame of 14 days and whether the rule should require a judge to set and/or hold a meeting within 14 days. The Committee discussed adding language that the court set a hearing within 14 days where the defendant was arrested in the district/county where the bench warrant was issued, and within 30 days where the defendant was arrested outside of the district/county where the bench warrant was issued. The Committee makes additional edits to include "judge or magistrate" throughout the rule, instead of just "magistrate." Following the discussion, Adam Crayk moved to submit this rule to the Supreme Court for review. David Ferguson seconded the motion. Without a quorum, the motion is temporarily suspended until the Committee can review the motion by email and finalize a vote.

Adjournment

The meeting was adjourned at 2:08 p.m. The Committee's next meeting will be March 19th, 2024, via Webex.

Email Votes

Following the meeting's adjournment, the Committee accepted email votes for the motion to approve the minutes and the motion to approve Rule 9A for public comment. Sufficient "yea" votes were received, and the motions passed. Rule 9A will be sent to the Supreme Court with a request to publish for public comment.



Utah Supreme Court
Rules of Criminal Procedure Committee

Meeting Minutes
March 19th, 2024

Committee members	Present	Excused	Guests/Staff Present
Douglas Thompson, Chair	X		Bryson King, Staff
Judge Kelly Schaeffer-Bullock	X		Amber Stargell, Rec. Secretary
Matthew Tokson		X	
William Carlson	X		
David Ferguson	X		
Meredith Mannebach	X		
Matthew Hansen	X		
Judge Denise Porter	X		
Janet Reese	X		
Lori Sepi	X		
Karin Fojtik	X		
Judge Kristine Johnson		X	
Adam Crayk		X	
Lindsey Wheeler		X	

Agenda Item 1: Welcome and Approval of January 16th, 2024 Minutes

Doug Thompson welcomed the members of the Committee and announced that minutes from the last meeting will be circulated via email for the Committee to review and approve.

Agenda Item 2: Report from the Supreme Court on Rule 9A

Doug then addressed the feedback from the Supreme Court on Rule 9A, which Doug presented to the Court at its last conference. In general, the Court recommended changes to clean up some of the language used throughout the Rule. The Court also struggled to understand how to define the term "subsequent court proceeding" in the Rule and suggested removing the term. Doug asked the Committee whether anyone had concerns or questions about these changes. Karin considered a title change to the Rule, but Doug and Karin agreed that the Rule should remain changed. After discussion concluded, Karin moved to approve the recommended changes to Rule 9A made by the Supreme Court, William Carlson seconded the motion, and without opposition, the motion carries. The Rule will be sent back to the Supreme Court for consideration and published for public comment.

Agenda Item 3: Proposed Amendment to Rule 17(k)

Doug then turned the Committee's attention to Rule 17(k), and asked Lori Seppi to take over discussion of the proposed amendments to the Rule. Lori explained to the Committee that prior to 2001, the Rule provided that a jury could take all court instructions, exhibits, and papers into deliberations, other than depositions. However, in 2001, the Rule was amended to state that a jury may take all court instructions and exhibits into deliberations, except those that the court determines the jury should not take. Lori then summarized portions of the advisory committee notes to the Rule and reviewed the facts and holdings of *State v. Wyatt* about whether evidence that is testimonial in nature should go back to the jury during deliberations. Lori then noted that the Supreme Court included a footnote in its opinion in *Wyatt* for the Committee to address whether additional guidelines should be built into Rule 17(k) about whether exhibits should be withheld from the jury based on a risk of undue emphasis. Lori reviewed suggested amendments to the Rule 17(k) that include using the language regarding undue emphasis or undue advantage to one side or another. Lori then invited

Doug to continue the discussion. Doug agreed that this is a Rule amendment the Committee should pursue, including addressing what materials are appropriate for the jury to consider and whether the common law rule should apply to the Rule or not. Judge Porter also discussed the possibility of undue advantage towards a party when body camera footage is included in the materials made available to the jury for deliberations. David Ferguson discussed that a related issue may exist where a jury goes back to view certain exhibits, like videos multiple times and the jury begins to see or develop impressions about things that don't exist in the materials. Doug also explains that the rule shouldn't create an incentive to admit evidence where it otherwise wouldn't be admitted, meaning if the rule allows unfettered access to videos, a party may choose to admit the evidence via a recorded video, instead of live testimony. William Carlson also offered that there is a distinction between taking depositions or recorded testimony back into the jury deliberations, and body camera footage of the scene of the alleged crime, and each scenario creates a fundamentally different problem or scenario for the jury. Will expressed caution about hamstringing juries from accessing certain exhibits or evidence that limits their fact finding efforts. Judge Schaeffer-Bullock also agrees that the Rule could be construed as an expression of distrust in the jury if we limit their ability to access certain evidence admitted in the trial and instruct them on how they may deliberate on that evidence. Judge Schaeffer-Bullock also expressed concern about the disparate opinions among the bench about how to use the discretion afforded by the Rule to determine whether evidence of the same type or characteristic could create undue advantage through undue emphasis. Karin Fojtik added that a second evidentiary hurdle could be created against a party and could trigger due process issues for defendants if evidence becomes unavailable for review by the jury in deliberations but is highly relevant to their case. Doug asked the Committee to weigh in on the definition of the term "exhibit," which is not defined in the Rule. Judge Porter offered that anything tangible that is admitted as evidence in the trial is an exhibit, which could include something physical like a photo, USB drive, data file, etc. Lori also explained that depositions and testimony are not exhibits, even if they are reduced to transcripts or written medium that could be made available to the jury. Other exhibits, like a recorded CJC interview, are testimonial in nature and share the same characteristics as deposition testimony or live testimony, and accordingly, should not go back with the jury. What remains uncertain are things like police interrogations, body camera interviews, and other similar items. After the discussion, Doug invited the Committee to decide what direction the Committee should head with the Rule. Karin wondered whether the Court should weigh in on the Committee's direction, but Doug explained that the Court is hesitant to give that direction, and defers to the Committee's

discretion. Committee members also expressed hesitation with defining the term "testimonial in nature" within the Rule, given the lack of clarity and guidance available from recent case law. Lori suggested simply planting the term, "testimonial in nature" within the Rule, and allowing courts to grapple with what the term means and how it applies in their own cases. Judge Schaeffer-Bullock also offered that the term could have its own exceptions, like hearsay, where evidence might be offered that is itself testimonial in nature, but not being offered for the purpose of the testimony presented, but something else. For example, a body camera video being offered not for the words a defendant spoke, but how he spoke them (i.e., in a DUI case for slurred speech). Matt Hansen also provided some insight about his experience with jurors requesting to exhibits, like recordings, again during deliberations, including that bailiffs often accompany the exhibit and play it for the jurors so it can't be manipulated, that judges don't tell jurors certain evidence won't go back with you when that evidence is first introduced, and that if a juror has watched a video once, its unlikely that unfair advantage is created by them watching the video again. Doug and Karin also provided insight from their experiences with the subject for the Committee's discussion. Following all the discussion, Lori volunteered to create a proposal for the Committee's next meeting.

Agenda Item 4: HB209 and Request to Amend Rule 12.5

Doug then addressed HB209 and its effect on Rule 12.5, but stated that the Committee would consider this item at its next meeting when Bryson is available to lead that discussion.

The meeting was adjourned at approximately 1:15pm. The Committee's next meeting with be May 21st at 12:00pm via Webex.

Tab 2

TO: Advisory Committee on the Utah Rules of Criminal Procedure

FROM: Lori Seppi

DATE: 5/15/2024

RE: Revised proposed amendments to URCrP 17(k) following *Wyatt v. State*, 2021 UT 32

At the March 19, 2024, committee meeting, the Committee reviewed the original proposed amendments to URCrP 17(k). After discussion, the Committee decided that the amendments should refer specifically to exhibits that are "testimonial in nature" but should not define what "testimonial in nature" means. Rather, the definition of "testimonial in nature" should be developed through caselaw. Based on this feedback, I've prepared these revised proposed amendments to URCrP 17(k) for the Committee's review.

Utah Rules of Criminal Procedure Rule 17

Rule 17. The Trial

Effective: May 1, 2019

Currentness

(a) Defendant's Presence. In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, the defendant may consent in writing to trial in the defendant's absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Calendar Priorities. Cases shall be set on the trial calendar to be tried in the following order:

(1) misdemeanor cases when defendant is in custody;

(2) felony cases when defendant is in custody;

(3) felony cases when defendant is on bail or recognizance; and

(4) misdemeanor cases when defendant is on bail or recognizance.

(c) Jury Trial in Felony Cases. All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) Jury Trial in Other Cases. All other cases shall be tried without a jury unless the defendant makes written demand at least 14 days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e)(1) *Number of Jurors.* In all cases, the number of members of a trial jury shall be as specified in Utah Code § 78B-1-104.

(2) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(f) Trial Process. After the jury has been impaneled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(3) The prosecution shall offer evidence in support of the charge;

(4) When the prosecution has rested, the defense may present its case;

(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and

(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(g) Alternate Jurors. If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(h) Questions by Jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(i) Juries Visiting Off-Site Places. When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, the officer will suffer no person other than the person so appointed to speak to them nor shall the officer speak to the jury on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(j) Admonition Prior to Recess. At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer

themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(k) Deliberations. Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits that are testimonial in nature, exhibits of unusual size, weapons, or contraband. The court shall permit the jury to view exhibits upon request except where viewing exhibits that are testimonial in nature will create a risk of unfair advantage to one side. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(*l*) Jury Under Officer's Charge. When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under the officer's charge shall not allow any communication to be made to them, nor shall the officer speak to the jury except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) Juror Questions During Deliberations. After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(n) Incorrect Verdict. If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(*o*) Directed Verdict. At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Credits

[Amended effective November 1, 2001; November 1, 2002; November 1, 2015. Advisory committee notes deleted effective May 1, 2019.]

Notes of Decisions (375)

Rules Crim. Proc., Rule 17, UT R RCRP Rule 17
Current with amendments received through September 1, 2023. Some rules may be more current, see credits for details.

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Tab 3

1 **AMENDMENTS TO CIVIL AND CRIMINAL ACTIONS**

2024 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Stephanie Gricius

Senate Sponsor: Stephanie Pitcher

2

3 **LONG TITLE**

4 **General Description:**

5 This bill addresses civil and criminal actions.

6 **Highlighted Provisions:**

7 This bill:

8 ▸ defines terms;

9 ▸ clarifies the requirements for bringing a civil action for human trafficking;

10 ▸ allows for the dissolution of a nonprofit organization in certain civil actions;

11 ▸ amends the requirements for transferring a criminal action from the justice court to the

12 district court; and

13 ▸ makes technical and conforming changes.

14 **Money Appropriated in this Bill:**

15 None

16 **Other Special Clauses:**

17 This bill provides a special effective date.

18 This bill provides a coordination clause.

19 **Utah Code Sections Affected:**

20 AMENDS:

21 **16-6a-1414 (Effective upon governor's approval) (Superseded 07/01/24)**, as enacted by

22 Laws of Utah 2000, Chapter 300

23 **16-6a-1414 (Effective 07/01/24)**, as last amended by Laws of Utah 2023, Chapter 401

24 **16-6a-1416 (Effective 07/01/24)**, as last amended by Laws of Utah 2023, Chapter 401

25 **16-6a-1417 (Effective 07/01/24)**, as last amended by Laws of Utah 2023, Chapter 401

26 **78A-7-106 (Effective upon governor's approval)**, as last amended by Laws of Utah 2023,

27 Chapter 34

300 conduct or result is itself unlawful;
301 (ii) either an individual committing an offense or a victim of an offense is located
302 within the court's jurisdiction at the time the offense is committed;
303 (iii) either a cause of injury occurs within the court's jurisdiction or the injury occurs
304 within the court's jurisdiction;
305 (iv) an individual commits any act constituting an element of an inchoate offense
306 within the court's jurisdiction, including an agreement in a conspiracy;
307 (v) an individual solicits, aids, or abets, or attempts to solicit, aid, or abet another
308 individual in the planning or commission of an offense within the court's
309 jurisdiction;
310 (vi) the investigation of the offense does not readily indicate in which court's
311 jurisdiction the offense occurred, and:
312 (A) the offense is committed upon or in any railroad car, vehicle, watercraft, or
313 aircraft passing within the court's jurisdiction;
314 (B) the offense is committed on or in any body of water bordering on or within
315 this state if the territorial limits of the justice court are adjacent to the body of
316 water;
317 (C) an individual who commits theft exercises control over the affected property
318 within the court's jurisdiction; or
319 (D) the offense is committed on or near the boundary of the court's jurisdiction;
320 (vii) the offense consists of an unlawful communication that was initiated or received
321 within the court's jurisdiction; or
322 (viii) jurisdiction is otherwise specifically provided by law.
323 (4) If in a criminal case the defendant is 16 or 17 years old, a justice court judge may
324 transfer the case to the juvenile court for further proceedings if the justice court judge
325 determines and the juvenile court concurs that the best interests of the defendant would
326 be served by the continuing jurisdiction of the juvenile court.
327 (5) Justice courts have jurisdiction of small claims cases under Title 78A, Chapter 8, Small
328 Claims Courts, if a defendant resides in or the debt arose within the territorial
329 jurisdiction of the justice court.
330 (6) (a) As used in this Subsection (6), "domestic violence offense" means the same as
331 that term is defined in Section 77-36-1.
332 (b) If a justice court has jurisdiction over a criminal action involving a domestic violence
333 offense and the criminal action is set for trial, the prosecuting attorney or the

334 defendant may file a notice of transfer in the justice court to transfer the criminal
335 action from the justice court to the district court.
336 (c) If a prosecuting attorney files a notice of transfer, the prosecuting attorney shall
337 certify in the notice of transfer that the prosecuting attorney, or a representative from
338 the prosecuting attorney's office, has consulted with, or notified, all of the alleged
339 victims about transferring the criminal action to the district court.
340 (d) The justice court shall transfer a criminal action to the district court if the justice
341 court receives a notice of transfer from:
342 (i) the defendant as described in Subsection (6)(b); or
343 (ii) the prosecuting attorney as described in Subsection (6)(b) and the prosecuting
344 attorney's notice of intent complies with Subsection (6)(c).
345 [~~(c) If a justice court receives a notice of transfer from the prosecuting attorney or the~~
346 ~~defendant as described in Subsection (6)(b), the justice court shall transfer the~~
347 ~~criminal action to the district court.~~]
348 Section 6. Section **78B-3-113**, which is renumbered from Section 77-38-15 is renumbered
349 and amended to read:
350 **[~~77-38-15~~] 78B-3-113. (Effective upon governor's approval). Right of action for a**
351 **victim of a human trafficking offense.**
352 (1) [~~A victim of a person that commits any of the following offenses may bring a civil~~
353 ~~action against that person:~~] As used in this section:
354 (a) "Human trafficking offense" means an offense for:
355 [~~(a)~~] (i) human trafficking for labor under Section 76-5-308;
356 [~~(b)~~] (ii) human trafficking for sexual exploitation under Section 76-5-308.1;
357 [~~(c)~~] (iii) human smuggling under Section 76-5-308.3;
358 [~~(d)~~] (iv) human trafficking of a child under Section 76-5-308.5;
359 [~~(e)~~] (v) aggravated human trafficking under Section 76-5-310;
360 [~~(f)~~] (vi) aggravated human smuggling under Section 76-5-310.1; or
361 [~~(g)~~] (vii) benefitting from human trafficking under Section 76-5-309.
362 (b) "Victim" means an individual against whom a human trafficking offense has been
363 committed.
364 (2) A victim has a right of action against a person that committed a human trafficking
365 offense against the victim to recover:
366 (a) [~~The court may award~~]actual damages, compensatory damages, punitive damages,
367 injunctive relief, or any other appropriate relief[~~.~~] for the human trafficking offense;

1 (a) A notice of transfer of a domestic violence case from a justice court to district court,
2 pursuant to Utah Code Ann. 78A-7-106(6), must be filed electronically, or in writing, in
3 the justice court within 14 days of the court setting the case for trial. If the trial date set
4 by the court is less than 22 days away, the notice must be filed within 7 days of the setting
5 of the trial date. A notice of transfer cannot be filed in a case that has not been set for
6 trial.

7 (1) The notice of transfer will identify the prosecuting entity for the case, defense
8 counsel, and at least the defendant's physical address. If a prosecuting attorney files
9 a notice of transfer, the notice must include certification of notification to all of the
10 alleged victims as required by Utah Code Ann. 78A-7-106(6). If available, the notice
11 should also include an email address for the defendant.

12 (2) The notice of transfer is irrevocable.

13 (b) Upon receiving a notice of transfer, the justice court shall transmit via email copies of
14 the notice of transfer and the Information to the address identified by the district court to
15 receive them.

16 (1) If no information has been filed when the notice to transfer is filed, the justice court
17 will order the prosecution to file an information within 7 days. Upon receipt of the
18 information, the justice court shall then transmit the notice to transfer and the
19 Information as required above.

20 (2) The justice court will also, upon request of the district court, transfer any monetary
21 bail posted by the defendant to the district court.

22 (c) Upon receiving the transferred case, the district court must set a scheduling conference
23 with the parties. Any pre-trial decisions made by the justice court will stand, unless the
24 district court, in its discretion, grants a motion to address them. The district court will
25 schedule further proceedings as needed.

26 (d) All further proceedings, including any pre-trial plea of guilty or no-contest, any trial,
27 and if necessary, sentencing shall occur in the district court. The matter shall not be
28 remanded to the justice court.

29 (e) Any appeal taken from a transferred case will be as if the case had originated in the
30 district court.

31 (f) If the transferred case is dismissed by the district court without prejudice, and any of
32 the charges from the dismissed case are refiled by the prosecutor, the information alleging
33 those violations will be filed in the district court.

34 (g) In any domestic violence case already set for trial in a justice court as of [date of
35 adoption], a party seeking to transfer shall file a notice to transfer on or before [14 days
36 later].

37 *Effective* ______

Tab 4

UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on "Continue Reading." To submit a comment, scroll down to the "Leave a Reply" section, and type your comment in the "Comment" field. Type your name and email address in the designated fields and click "Post Comment."

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

HOME LINKS

Posted: January 24, 2024

Utah Courts

Rules of Criminal Procedure – Comment Period Closed March 9, 2024

URCrP008. Appointment of Counsel. Amend. The Supreme Court's Advisory Committee on the Rules of Criminal Procedure recently amended Rule 8 to clarify the responsibility of judges during a self-representation colloquy to waive the right to counsel. The Committee's efforts aimed to emphasize the right to self-representation as a constitutional right directly related to the right to counsel and the right to appointed counsel for indigent defendants. Additional provisions to the Rule include amendments to the qualifications for appointment on capital cases to require that attorneys representing those defendants have sufficient criminal practice, experience, and training. The Rule is approved for a 45-day public comment period.

This entry was posted in **-Rules of Criminal Procedure**, **URCrP008**.

« Rules of Evidence – Comment Period Closed

Rules of Appellate Procedure – Comment Period Closed

Search... SEARCH

To view all comments submitted during a particular comment period, click on the comment deadline date. To view all comments to an amendment, click on the rule number.

CATEGORIES

- -Alternate Dispute Resolution
- -Code of Judicial Administration
- -Code of Judicial Conduct
- -Fourth District Court Local Rules
- -Licensed Paralegal Practitioners Rules of Professional Conduct
- -Rules Governing Licensed Paralegal Practitioner
- -Rules Governing the State Bar

March 10, 2024 | February 17, 2024 »

UTAH COURTS

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5 thoughts on "Rules of Criminal Procedure – Comment Period Closed March 9, 2024"

Dominique Kiahtipes
January 24, 2024 at 4:19 pm

(c)(1)(A) seems overly broad and a little ambiguous. I'd like to see a list on what specific dangers and consequences the Court would like trial courts to discuss with the defendants prior to waivers. I understand that with each case/charge the dangers and consequences will be different, but I think leaving it as is opens the door to any pro se defendant making an argument that the trial court did not discuss x, y, or z (insert danger of choice) with them prior to the waiver.

George LaBonty
January 25, 2024 at 2:50 pm

Adding experience and training requirements for attorneys appointed on capital cases seems like a common sense move. When the stakes are so high, we should make sure whoever is appointed isn't biting off more than they can chew.

Sarah Carlquist
January 25, 2024 at 4:18 pm

I am writing to express my support for the amendments in proposed-subsection (d) of the rule relating to the qualifications of appointed capital counsel. The added requirement that at

- -Rules of Appellate Procedure
- -Rules of Civil Procedure
- -Rules of Criminal Procedure
- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Professional Practice
- -Rules of Small Claims Procedure
- ADR101
- ADR103
- Appendix B
- Appendix F
- CJA Appendix F
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0205
- CJA01-0302
- CJA01-0303
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- CJA010-01-0404
- CJA010-1-020
- CJA02-0101
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least one of the appointed attorney's criminal law experience be as defense counsel is critical. The skills necessary to defend a capital case are vastly different from the skills related to prosecuting a capital case. I don't think it's possible to list all the important differences in this comment. But the one that springs to mind is investigating and presenting mitigation evidence. Effectively presenting mitigation evidence to the jury to convince them that they should spare the defendant the death penalty is arguably one of the most important aspects of a capital case. The ability to effectively present the horrible experiences, traumas, abuses, and addiction issues of a capital defendant to convince the jury that the defendant deserves mercy is an art. And the stakes are too high and the risk is to great, that someone without the necessary defense experience could present the evidence ineffectively and actually cause the jury to decide, based on the mitigating evidence, that the defendant's life isn't worth saving.

I also have 2 stylistic questions/comments:
Lines 61-62 are confusing (I also recognize that it appears those lines are unchanged from the previous version of the rule). Do those lines mean that every appointed attorney must have at least 5 years active practice in the law? If so what about: each appointed attorney must have at least five years experience in the active practice of law.

Lines 63-64: The use of "at least" in these lines reads awkwardly in my opinion. I think the "at least" is intended to give the judge discretion to consider other factors that he or she may believe are relevant. If so, I think there is probably a clearer way to say that. I don't know what a better or clearer way might be, but it might be worth considering an edit.

Janet Lawrence
January 26, 2024 at 1:11 pm

I agree with the substance of Sarah's comment.

Lines 63-64: Perhaps changing "at least" to "at a minimum"?

Also, it seems like the new subsection (h) really should be a part of (f).

Christopher Bates on behalf of the Utah Attorney General's Office
March 5, 2024 at 4:12 pm

Utah Attorney General Office comments on proposed Utah R. Crim. P. 8 changes:

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The proposed revisions could benefit from clarification to emphasize what defendants must understand before representing themselves. For example, proposed rule 8(c)(1)(B)(ii) requires a judge to explain "that the case is subject to the Rules of Criminal Procedure and the Rules of Evidence." Stating "that the case is subject to" employs abstract language that could confuse defendants. The rule could benefit from more direct language, such as directing judges to explain "that all parties in the case, including the defendant, will be bound by" the rules of evidence and criminal procedure. See Faretta v. California, 422 U.S. 806, 836 (1975) (noting the defendant had been warned he "would be required to follow all the 'ground rules' of trial procedure").

The proposed revision also provides that "As part of its colloquy, the court may inquire as to the defendant's literacy, educational background, and legal training to assess the defendant's understanding of the consequences of waiver." The use of a permissive "may" in this section suggests that such an inquiry is optional. But Utah caselaw holds that district courts "should … carefully evaluate the accused's background, experience, and conduct insofar as they indicate what the accused understands in attempting to waive the right to counsel." State v. Bakalov, 1999 UT 45, ¶23, 979 P.2d 799. United States Supreme Court precedent similarly holds that these factors are relevant. See Faretta, 422 U.S. at 807, 835-36 (noting that questioning "revealed that Faretta had once represented himself in a criminal prosecution" and "had a high school education" and holding that Faretta knowingly, intelligently, and voluntarily waived his counsel because, among other things, the record showed that he "was literate"); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts" of the case, "including the background" and "experience" of the defendant). And Utah courts have reversed convictions for failure to inquire into these sorts of factors. See State v. Patton, 2023 UT App 33, ¶19, 528 P.3d 1249 (holding that the district court "did not perform a complete colloquy" because it "did not inquire about Patton's education, understanding of the legal system, or knowledge of the Utah procedural or evidentiary rules"). The rule should therefore be revised to make clear that an inquiry into these factors is mandatory ("will inquire") and not merely discretionary.

The rule would also benefit by making explicit the consequences of a finding that a defendant has not knowingly, intelligently, and voluntarily waived the right to counsel. This could be accomplished through a new subsection providing that when a court finds a defendant's waiver is not knowing, intelligent, and voluntary, the court will deny self-representation.

Other proposed revisions create inconsistencies with controlling precedent and should be altered or deleted.

First, proposed rule 8(a)(3) states that "A defendant has the right to self-representation if the defendant waives the right to counsel as described in paragraph (c)." Strictly speaking, that is true—a defendant who has waived counsel in the manner

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described in the rules has a right to self-representation. Court rules, however, are generally interpreted in light of the expressio unius canon, which holds that "to express or include one thing implies the exclusion of the other, or of the alternative." McKitrick v. Gibson, 2021 UT 48, ¶38, 496 P.3d 147; see also Clark v. Archer, 2010 UT 57, ¶9, 242 P.3d 758 (court rules are interpreted using the "general rules of statutory construction"). Stating that a defendant "has the right to self-representation if the defendant waives the right to counsel as described" in the rule could therefore be read to imply that a defendant does not have the right to self-representation if the defendant does not waive as described in the rule.

That implication would conflict with the U.S. Supreme Court's articulation of the right to self-representation in Faretta, which does not make the right conditional on completing a waiver colloquy or on any explicit waiver at all. Faretta grounded the right to self-representation in the structure of the Sixth Amendment to the federal constitution, which the Court said "grants to the accused personally the right to make his defense." Id. at 819 (emphasis added). The Court was emphatic about the importance of honoring a defendant's right to self-representation. It said that to deny a defendant "in the exercise of his free choice the right to dispense" with the assistance of counsel "is to imprison a man in his privileges and call it the Constitution." Id. at 815 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 280 (1942)).

But the Court also said the right to self-representation is not without guardrails. As relevant here, the Court explained that "in order to represent himself, the accused must 'knowingly and intelligently' forgo" the "benefits associated with the right to counsel." Id. at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)). The Court further instructed that the accused "should be made aware of the dangers and disadvantages of self-representation." Id. Nowhere does Faretta require a colloquy. Nor does it say there must be an express waiver of "the benefits associated with the right to counsel." Id.

The proposed language should be revised to clarify that the right to self-representation is not conditional upon the colloquy or on any formal waiver finding by the court. One possibility could be: "A defendant who waives the right to counsel as described in paragraph (c) has the right to self-representation. But a waiver colloquy or waiver finding is not necessary for a defendant to have the right to self-representation." The second sentence in the quotation marks makes clear that absence of a colloquy or waiver finding is not itself grounds for reversal, as set forth in State v. Frampton, 737 P.2d 183, 188 (Utah 1987), State v. Bozarth, 2021 UT App 117, ¶41, 501 P.3d 116, and other cases.

Second, the revision fails to mention the possibility of a court appointing standby counsel if the court deems it necessary to protect indigent defendants' rights to counsel. Standby counsel can serve "to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is

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- CJA09-0302
- CJA09-109
- CJA10-1-203
- CJA10-1-602
- CJA11-0101
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necessary." Faretta, 422 U.S. at 834, n.46. And they can also serve as a resource while the defendant carries out the primary duties of representation such as questioning witnesses, delivering arguments, and conducting hearings. See Bozarth, 2021 UT App 117, ¶47.

But the proposed revisions do not mention the possibility of appointing standby counsel. And for the reasons discussed above, this failure to mention the possibility of standby counsel could be read to imply, under the expressio unius canon, that appointment of standby counsel is impermissible. Proposed rule 8(c)(i)(C)(1)(i)(2), moreover, does not fill this hole. It only permits courts to appoint counsel "for the limited purpose of consulting with the defendant regarding the waiver of counsel"; it does not permit courts to appoint standby counsel.

Accordingly, a new paragraph should be added that expressly grants courts the discretion to appoint standby counsel for indigent defendants when they elect to represent themselves. This new paragraph should clarify that standby counsel is "to aid…if and when the accused requests help" and is not responsible for conducting the representation. Faretta, 422 U.S. at 834 n.46.

Third, the proposed rule directing judges to examine defendants' understanding "that the elements of the charged crime(s) are governed by the laws and ordinances of the State of Utah and its political subdivisions" and "that there may be legal defenses governed by the laws of the United States, the State of Utah, and Utah's political subdivisions" adds topics that no authority requires defendants to demonstrate knowledge of before exercising their right to self-representation. Nothing in Frampton requires courts to advise defendants that a specific jurisdiction's laws apply or that defenses might exist. 737 P.2d at 188 n.12. And Faretta simply says that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" 422 U.S. at 835 (quoting Adams, 317 U.S. at 280). Faretta also stressed that legal knowledge wasn't the touchstone for self-representation. See id. ("[Defendant's] technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."). Requiring defendants to express such legal knowledge before permitting them to waive counsel thus risks denying defendants their constitutional right to self-representation. The better approach would therefore be to include in the rule only those topics recognized in existing caselaw as important elements of the waiver colloquy.

Finally, proposed rule 8(c)(3) permits defendants to "revoke the waiver of counsel and either retain counsel or seek the appointment of counsel." Read literally, this would appear to permit defendants to revoke valid waivers at any time and for any reason. That creates considerable potential for mischief. Defendants cannot use disruptive conduct "indefinitely to avoid being tried on the charges brought" against them. Illinois v. Allen, 397 U.S. 337, 346 (1970). Likewise, "[t]he right of self-

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- CJC04
- CJC04.1
- CJC05
- CJCApplicability
- Fourth District Local Rule 10-1-407
- LPP1.00
- LPP1.01
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representation is not a license to abuse the dignity of the courtroom." Faretta, 422 U.S. at 834 n.46. And judges can terminate self-representation when it becomes clear that a defendant is abusing his or her rights and disrupting the court. Id.; McKaskle v. Wiggins, 465 U.S. 168, 173-74 (1984).

The better approach would therefore be to remove the proposed 8(c)(3) entirely. The circumstances which might or might not justify a revocation of a waiver of counsel are so numerous and varied as to make it impossible to practically capture them in a single rule. Alternatively, and at a minimum, the rule should expressly acknowledge the substantial discretion, as recognized in caselaw, that trial judges have to regulate waivers of counsel (and revocations of waivers of counsel) where appropriate. A trial judge is best positioned to strike an appropriate balance between recognizing the right to self-representation with preserving the proceeding's integrity and fairness. Id.; see also Allen, 397 U.S. at 345-47. Trusting the judge to oversee changes with waivers also parallels how the proposed rule permits defendants to exercise the right to self-representation. The proposed rule requires a colloquy about a defendant's ability to undertake that representation knowingly and voluntarily, before the "court" accepts the waiver. Considering these factors, the rule should follow existing practice and have the judge oversee a waiver, rather than permit defendants to waive and revoke their waivers at will.

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(a) **~~Right to counsel~~ Representation.**

(1) A defendant charged with any ~~public~~ offense has the right to be represented by counsel at all stages of the prosecution.~~ self-representation the penalty for which includes the possibility of incarceration, regardless of whether actually imposed, has the right to counsel, and if~~

(2) An indigent~~,~~ defendant charged with a misdemeanor or felony has the right to court-appointed counsel ~~if the defendant faces any possibility of the deprivation of liberty~~.

(3) A defendant has the right to self-representation if the defendant waives the right to counsel as described in paragraph (c).

(b) **Appointment.** Except in circumstances provided in paragraphs (d), (e), (f), and (g), or when the defendant waives representation as described in paragraph (c), if the trial court finds the defendant is indigent pursuant to Utah Code section 78B-22-202, the court will appoint an indigent defense service provider according to Utah Code section 78B-22-203.

(c) **Waiver of counsel.**

(1) Prior to accepting a waiver of the right to counsel, the court will engage in a colloquy with the defendant to ensure that such waiver is knowing, intelligent, and voluntary. The court will:

(A) inform the defendant of the dangers, disadvantages, and consequences of self-representation;

(B) discuss the defendant's specific understanding:

(i) of the nature of the charges and the range of potential penalties;

(ii) that the case is subject to the Rules of Criminal Procedure and the Rules of Evidence;

(iii) that the elements of the charged crime(s) are governed by the laws and ordinances of the State of Utah and its political subdivisions; and

(iv) that there may be legal defenses governed by the laws of the United States, the State of Utah, and Utah's political subdivisions;

(C) determine whether the defendant is indigent pursuant to Utah Code section 78B-22-202.

(i) If the court determines the defendant is indigent, the court:

1. will offer the defendant the opportunity to have counsel appointed; and

2. may appoint counsel for the limited purpose of consulting with the defendant regarding the waiver of counsel.

(2) As part of its colloquy, the court may inquire as to the defendant's literacy, educational background, and legal training to assess the defendant's understanding of the consequences of waiver.

(3) A defendant may revoke the waiver of counsel and either retain counsel or seek the appointment of counsel.

(~~b~~d) **Capital case qualifications.** In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court ~~shall~~ will appoint two or more attorneys to represent ~~such~~ the defendant and ~~shall~~ will make a finding on the record ~~based on the requirements set forth below~~ that appointed counsel is competent in the trial of capital cases. ~~In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements~~ To be found competent to represent a defendant charged in a capital case, the combined experience of the appointed attorneys must meet the following requirements:

50 ~~(b)~~(1) at least one of the appointed attorneys must have tried to verdict at least six
51 felony cases as defense counsel within the past four years or ~~twenty-five~~ 25 felony
52 cases total, with at least six of the 25 felony cases as defense counsel;

53 ~~(b)~~(2) at least one of the appointed attorneys must have appeared as defense
54 counsel or defense co-counsel in a capital or a felony homicide case which was
55 tried to a jury and which went to final verdict;

56 ~~(b)~~(3) within the last five years, at least one of the appointed attorneys must have
57 completed or taught, in person, ~~within the past five years an~~ at least eight hours
58 of approved continuing legal education ~~course or courses at least eight hours of~~
59 which dealt, in substantial part, with the ~~trial~~ representation of defendants in
60 death penalty cases; and

61 ~~(b)~~(4) the experience of one of the appointed attorneys must total not less than five
62 years in the active practice of law.

63 (~~c~~e) **Capital case appointment considerations.** In making its selection of attorneys for ~~a~~
64 appointment in a capital case, the court ~~should~~ will also consider at least the following
65 factors:

66 ~~(c)~~(1) whether one or more of the attorneys under consideration have previously
67 appeared as defense counsel or defense co-counsel in a capital case;

68 ~~(c)~~(2) the extent to which the attorneys under consideration have sufficient time
69 and support and can dedicate those resources to the representation of the
70 defendant in the capital case now pending before the court with undivided loyalty
71 to the defendant;

72 ~~(c)~~(3) the extent to which the attorneys under consideration have engaged in the
73 active practice of criminal law in the past five years;

74 ~~(c)~~(4) the diligence, competency, the total workload, and ability of the attorneys
75 being considered; and

76 ~~(c)~~(5) any other factor which may be relevant to a determination that counsel to be
77 appointed will fairly, efficiently, and effectively provide representation to the
78 defendant.

79 (~~d~~f) **Capital case appeals.** In all cases where an indigent defendant is sentenced to death,
80 the court ~~shall~~ will appoint one or more attorneys to represent such defendant on appeal
81 and ~~shall~~ will make a finding that counsel is competent in the appeal of capital cases. To
82 be found competent to represent on appeal ~~persons~~ a person sentenced to death, the
83 combined experience of the appointed attorneys must meet the following requirements:

84 ~~(d)~~(1) at least one attorney must have served as counsel in at least three felony
85 appeals; and

86 ~~(d)~~(2) within the last five years, at least one attorney must have attended and
87 completed ~~within the past five years~~ an approved continuing legal education
88 course which ~~deals~~ dealt, in substantial part, with the trial or appeal of death
89 penalty cases.

90 (~~e~~g) **Post-conviction cases.** In all cases in which counsel is appointed to represent an
91 indigent petitioner pursuant to Utah Code ~~§~~ section 78B-9-202~~(2)(a)~~, the court ~~shall~~ will
92 appoint one or more attorneys to represent such petitioner at post-conviction trial and on
93 post-conviction appeal and ~~shall~~ will make a finding that counsel is qualified to represent
94 persons sentenced to death in post-conviction cases. To be found qualified, the combined
95 experience of the appointed attorneys must meet the following requirements:

96 ~~(e)~~(1) at least one of the appointed attorneys must have served as counsel in at least
97 three felony or post-conviction appeals;

98 ~~(e)~~(2) at least one of the appointed attorneys must have appeared as counsel or co-
99 counsel in a post-conviction case at the evidentiary hearing, on appeal, or
100 otherwise demonstrated proficiency in the area of post-conviction litigation;

101 (e)(3) within the last five years at least one of the appointed attorneys must have
102 attended and completed or taught within the past five years an approved
103 continuing legal education course which dealt, in substantial part, with the trial
104 and appeal of death penalty cases or with the prosecution or defense of post-
105 conviction proceedings in death penalty cases;

106 (e)(4) at least one of the appointed attorneys must have tried to judgment or verdict
107 three civil jury or felony cases within the past four years or ten cases total; and

108 (e)(5) the experience of at least one of the appointed attorneys must total not less
109 than five years in the active practice of law.

110 (fh) **Appointing from appellate roster.** When appointing counsel for an indigent
111 defendant on appeal from a court of record, the court must will select an attorney from
112 the appellate roster maintained by the Board of Appellate Judges under rule 11-401 of the
113 Utah Rules of Judicial Administration, subject to any exemptions established by that rule.

114 (gi) **Noncompliance.** Mere noncompliance with this rule or failure to follow the
115 guidelines set forth in this rule shall will not of in itself be grounds for establishing that
116 appointed counsel ineffectively represented the defendant at trial or on appeal.

117 (j) **Litigation expenses and attorney fees.**

118 (h)(1) Cost Litigation expenses and attorneys' fees for appointed counsel shall will
119 be paid as described in Chapter 22 of Title 78B.

120 (h)(2) Cost Litigation expenses and attorneys fees for post-conviction counsel shall
121 will be paid pursuant to Utah Code § section 78B-9-202(2)(a).